S... Court, U. S.
FILED
APR 23 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION TO DISMISS

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

E. L. MERDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

MOTION TO DISMISS OR AFFIRM 1

Certificate 3

BRIEF IN SUPPORT OF MOTION TO DISMISS 5

Facts 5

A. Statement of the Case 5

Argument 11

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extra-territorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce 11

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed from, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies 21

Conclusion 27

Table of Authorities

CASES

Bailey v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) 25

Baldwin v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934) 16, 19
Dean Milk Company v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) 16, 19
Dixie Dairy Co. v. *City of Chicago*, 355 F.Supp. 1351 (N.D. Ill., 1973) 18
Florida Lime and Avacado Growers, Inc. v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) 13
Frasier v. *Board of Trustees of University of North Carolina*, (D.C. N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956) 26
Golden v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) 25
Great Atlantic & Pacific Tea Co. of La. v. *Cottrell*, 383 F.Supp. 569 (S.D. Miss., 1974) 5, 9, 10, 23
Gulf Oil Corp. v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974) 15
H. P. Hood & Sons v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948) 13
Huron Cement Co. v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) 18
Lawton v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894) 17
Milk Control Board v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 20
Mintz v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933) 20
Moody v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed. 2d 643 (1967) 23-24, 26
Perez v. *Ledesma*, 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) 27

Phillips v. *United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941) 26
Polar Ice Cream & Creameries Co. v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964) 16
Public Service Commission v. *Wycoff*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952) 25
Rockefeller v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) 26
United Public Workers of America v. *Mitchum*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) 25
United States v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943) 13

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES

Article I, §8, Clause 5, Constitution of the United States 5
Regulations Governing the Production and Sale of Milk and Milk Products, Section 11 ..... 1, 2, 5-7, 9, 11-15, 17-27
28 USC 1253 ..... 2, 23, 24, 25, 26
28 USC 2281 ..... 2, 23, 24

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court under Supreme Court Rule 16 to dismiss the appeal in that (1) it does not present a substantial federal question as to the claim that §11 of the Mississippi State Board of Health "Regulation governing the production and sale of milk and milk products" unconstitutionally burdens interstate commerce by requiring reciprocal standards of milk inspection and milk ratings between shipping and accepting states, or (2) a substan-

tial federal question that the requirement of reciprocal inspection ratings and inspection standards for out-of-state milk instead of taxes on producers to support extra-territorial inspections is irrational or constitutes an impermissible burden on interstate commerce. (3) Further, this Court lacks jurisdiction of the claim that the shipping of processed milk by Louisiana companies grandfathered in when the present Regulation 11 was passed, since that claim does not attack a statute or regulation of statewide application under 28 USC 2281.

Alternatively, appellee moves the Court to affirm the final judgment of the District Court on the ground that it is manifest that the questions upon which the decision of the cause depends are so insubstantial as not to need further argument: (1) Because the claim that a state may not, consistent with the commerce clause, rely upon reciprocal inspection standards and ratings thereunder rather than inspect plants and facilities outside the accepting state is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of this Court. (2) Because the claim that Mississippi is furthering the interests of local producers and discriminating against out-of-state producers is contrary to the finding of fact made by the District Court that the regulation is free trade in effect by facilitating the flow of out-of-state milk from nine sister states. (3) Because the equal protection claim asserted by appellant that certain producers were grandfathered in before the present regulatory scheme took effect was not within the jurisdiction of the Three Judge Court under 28 USC 2281 and not within the appellate jurisdiction of this Court under 28 USC 1253.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the District Court denying all relief be affirmed.

Respectfully moved, this, the 22nd day of April, 1975.

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

By: HEBER LADNER, JR.

CERTIFICATE

I, Heber Ladner, Jr., one of the attorneys for the appellee, hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the foregoing Motion to Dismiss or Affirm to Sam Lang and Howard S. Linzy, Esq., attorneys for the appellant, at their usual mailing address, P. O. Box 60118, New Orleans, Louisiana 70160.

This, the 22nd day of April, 1975.

HEBER LADNER, JR.

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

A. Statement of the Case

On October 25, 1972, the appellant Great Atlantic & Pacific Tea Company, Inc. [hereafter A & P], filed this suit to invalidate §11 of the milk regulations of the Mississippi State Board of Health. That regulation requires that Mississippi health authorities accept the substantial equivalency of Louisiana's milk regulations and Louisiana's milk ratings of 90 percent or more if Louisiana will reciprocate as to Mississippi's milk in these same two undertakings. Mississippi has accepted Louisiana's regulations and ratings with respect to appellant A & P. Louisiana declines to reciprocate. Under the regulation Louisiana processed milk is then barred from Mississippi.

A & P alleges that Mississippi's requirement that Louisiana reciprocate in its ratings and standards of inspection for out-of-state processed milk infringes Article I, §8, Clause 5, of the Constitution of the United States. After hearing and the submission of extensive stipulations of fact, the Three Judge Court held that the challenged section of Mississippi's regulations was a warranted exercise of Mississippi's police power free from any constitutional infirmity. *Great Atlantic & Pacific Tea Co. of La.* v. *Cottrell*, 383 F.Supp. 569, Three Judge Court (S.D. Miss., 1974).

The District Court concluded that Mississippi's triple-edged requirements of (1) milk production and processing under substantially equivalent regulations by a sister state; (2) a milk rating of 90 percent or above according to U. S.

Public Health Service standards; and (3) reciprocity of inspection ratings and inspection standards between sending and receiving states, were constitutional. The Court reasoned that the incidental or indirect burden upon commerce was overborne by specific proof that the application of Mississippi's regulation was free trade in design and effect. Sixteen dairies from nine states export milk to Mississippi under reciprocal agreements. The mutual exchange of inspection results and standards of inspection between sister states under §11 actually facilitates commerce in milk.

The Court found that Mississippi's policies had demonstrably opened free milk trade, lowered trade restrictions, and insured the enforcement of minimum health standards for milk originating out of state. The reciprocity created by §11 was viewed by the District Court as a reasonably nondiscriminatory alternative to onsite inspections of milk processing facilities outside the police jurisdiction of Mississippi or an excise tax on processors to defray the cost of these inspections. Accordingly, the complaint was dismissed on the merits. This appeal ensued.

In 1969 the Great A & P Tea Company of Louisiana leased from Dairymen, Inc., a dairy processing facility in Kentwood, Louisiana. That facility produces all the milk at issue in this case. According to the affidavit of Wade Buff, the Kentwood facility presently produces 2,903,000 gallons of milk ultimately sold within the State of Louisiana. The permit was sought for the excess capacity of approximately 750,000 gallons per year. After the plant was acquired no production was had during 1970 nor during the first two calendar quarters of 1971. Serious production was begun in the Kentwood facility in 1972. [Exhibit G, pp. 2-4, *Original Stipulation*]

On August 28, 1972, three years after acquisition of the Kentwood facility, A & P sought a permit to distribute its Kentwood products in the State of Mississippi. [*Original Stipulation*, Exhibit IV] A & P failed to forward the requested reciprocal agreement certifying that Louisiana would accept the validity of Mississippi's inspections. Apparently A & P viewed the statement of Louisiana's Chief Health Officer that Louisiana had not entered reciprocity agreements with any states as a circumstance rendering compliance impossible. Thereafter A & P treated the September 18, 1972, letter from the Supervisor of Mississippi's Milk Control Program as a final denial and thereafter entered suit. [*Original Stipulation*, Exhibits II, V]

§11 is Mississippi's answer to the interruption in trade that results when states like Louisiana bar out-of-state processed milk. It is against the backdrop of the regulations applicable to domestic producers that §11 is best understood. Without §11, each state's different and exacting standards come into play. Because of milk's unique nutritional importance and susceptibility to contamination, its processing and pasteurization are subject to extremely exacting standards. [See Exhibit H, Regulation Governing the Production and Sale of Milk Products, Mississippi State Board of Health, *Original Stipulation;* and Exhibit J, Milk and Milk Products Regulations, Chapter V, Sanitary Code of the State of Louisiana, Louisiana State Board of Health] A categorical comparison between the applicable Louisiana and Mississippi inspection standards yields the following result:

Items	Louisiana	Mississippi	Interpretation
Imported Milk	May accept certification of inspection and supervision from other governmental agencies	Certification of reciprocity of inspection and supervision of sanitation and 90% or above sanitation compliance	Mississippi is equal to or exceeds Louisiana's requirements
Frequency of Tuberculosis Tests of Dairy Cattle	Six years	Three years	Mississippi exceeds
Lighting and Ventilation in Barns	Ten percent of floor area in windows	Eight square feet per stanchion	Mississippi exceeds
Lighting and Ventilation in Milk House	Ten percent of floor area in windows	Fifteen percent of floor area in windows	Mississippi exceeds
Pasteurized Milk Delivery Temperature	50° F.	45° F.	Mississippi exceeds
Frequency of Dairy & Plant Inspections	At least one per six months	At least four per six months	Mississippi exceeds
Abnormal Milk (Mastitis) Standard	No specific requirement shown in Louisiana Regulation	Maximum of 1,000,000 per ml. cell count per ml. of milk	Mississippi exceeds
Degrading or Permit Suspension for Violating Mastitis Tests	Three consecutive violations	Violation of three out of last five sample results	Mississippi exceeds
Frequency of Milk Sampling	None listed	At least four per six months	Mississippi exceeds

These line-by-line comparisons are drawn from Exhibits H and J, *Original Stipulation*. They reveal the basic differences between Louisiana's and Mississippi's domestic requirements. The District Court assumed, arguendo, that this chart was a true representation of the differences in health, production, and sanitation standards. *Great A & P Tea Co., Inc. v. Cottrell, supra*, p. 575. The authenticity of this tabulation is not challenged in appellant's jurisdictional statement.

In 1967 the Mississippi State Board of Health adopted §11 of the regulations. The adoption thereafter waived application of the cited standards for domestic producers, *supra*, to sister state producers in favor of reciprocal agreements. Under §11 the following dairies export milk into Mississippi under a reciprocal inspection agreement:

*ALABAMA	Dixie Dairies, Inc., Prichard, Alabama Barber Pure Milk Co., Mobile, Alabama
ARKANSAS	Dean Milk Co., Conway, Arkansas
FLORIDA	Reddi-Wip Co., Jacksonville, Florida
GEORGIA	Sealtest Foods, Atlanta, Georgia
KENTUCKY	General Dairy Service, Murray, Kentucky
*LOUISIANA	Borden Co., Franklinton, Louisiana Borden Co., New Orleans, Louisiana Sealtest Dairy Products, New Orleans, Louisiana Superbrand Dairy Products, New Orleans, Louisiana
MICHIGAN	Michigan Prod. Dairy Co., Sebewaing, Michigan
MISSOURI	Mid-America Dairymen, Inc., Lebanon, Missouri Sealtest Foods, St. Louis, Missouri

TENNESSEE	Dairymen, Inc., Nashville Div., Lewisburg, Tenn.
	Midwest Farms, Memphis, Tennessee
	Sealtest Foods, Memphis, Tennessee
	Dean Foods, Co., Memphis, Tennessee
	Turner Dairies, Covington, Tennessee
WISCONSIN	Dean Foods Co., Janesville, Wisconsin
	Bancroft Dairy, Madison, Wisconsin

Louisiana's health authorities were not before the District Court because of the proscriptions of Rule 4, Federal Rules of Civil Procedure. At the conclusion of the hearing the District Court invited memoranda on the question of whether Louisiana officials could be joined. Both parties agreed that such a step was impossible and the Court so held. *Great A & P Tea Company* v. *Cottrell, supra,* p. 569. The Court properly recognized that "if the reciprocity clause could be said to be retaliatory in nature the guilty party is Louisiana not Mississippi." *Id.* at p. 576.

Revealing evidence of Louisiana's policy was contained in the letter of Dr. Ramson K. Vidrine, Louisiana's State Health Officer. [*Original Stipulation,* Exhibit II] As he articulated Louisiana's policy, that state refuses to accept milk which does not meet Louisiana standards:

> "At present we are not receiving out-of-state processed milk from Mississippi, a state of particular concern to you, because the milk does not meet our standards. . . . Again, we have no objection to importation of milk into Louisiana so long as it meets the same standards we require of intrastate producers and processors. Louisiana has not entered reciprocity agreements with any state." [*Original Stipulation,* Exhibit II]

Louisiana's policy, authoritatively articulated through Dr. Vidrine, is at war with the commerce clause. Moreover, there is no factual support for the proposition that Mississippi milk does not meet Louisiana's written standards. Dr. Vidrine has adopted the policy against reciprocal agreements despite a statutory policy in Louisiana favoring reciprocal agreements: "The State Health Officer may accept the certificate of inspection of a duly authorized government representative, agent, or agency of such other state wherein such products are produced." [Para. 5.B.1., Exhibit J, *Original Stipulation,* Chapter 5, Milk, Milk Products and Manufactured Milk Products Regulations, January 28, 1968, p. 6]

ARGUMENT

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extraterritorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce.

The regulation at issue here is plain and unequivocal:

> "Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U. S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and pro-

cessed in Mississippi on a reciprocal basis. . . ." (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11)

The regulation does not say without more that Louisiana milk is barred from export to Mississippi unless Mississippi milk can enter Louisiana. Appellant maintains in its jurisdictional statement that Part One of the regulation respecting inspection standards is constitutional while reciprocity is not. [Jurisdictional Statement of Appellants, p. 7] Of course, the regulation is not severable for two interrelated sets of reasons.

First, the health requirements of Part One and the reciprocity requirements of Part Two are inextricably bound up with each other. §11 covenants that Mississippi will do the inspections, will certify them, and will accept a standard below that applicable to domestic producers if the forwarding state will do the same. Second, Parts One and Two are not severable because severability would allow a lesser standard of health and sanitation for domestic producers than out-of-state producers. The commerce clause does not require that Mississippi affirmatively disadvantage domestic producers in a way which might offend the Equal Protection Clause of the Fourteenth Amendment. Finally, the appellant is incorrect when he says that A & P meets all the health related requirements of the Mississippi regulation. Absent reciprocity, which Louisiana stoutly refuses to grant, the substantial equivalency standard in the regulations is *exact compliance* with Mississippi's standards for domestic producers.

A & P's milk from the Kentwood plant is, therefore, not barred by its failure to meet the health requirements of Part One of §11, but by its failure to comply with standards for domestic processors set out at p. 8, *supra*. A & P evinces a misunderstanding of this when they represent

that "A & P has complied with all health related requirements of the milk regulation, within the meaning of §11." Absent on-site inspections of the Kentwood plant, which have not taken place (Testimony of Clinton Van Devender, Transcript of Testimony on Motion for Preliminary Injunction, p. 6), and Louisiana's proven shortfall in its own regulations below that of Mississippi's, A & P's milk does not meet the health requirement. Because of the nonseverability of §11, A & P cannot have its milk judged according to the relaxed standards of §11. As to the domestic standards which for nonreciprocating states become "substantial equivalency", A & P did not allege or prove compliance with these standards and is, therefore, barred by them since compliance is not evident.

These Mississippi health and safety standards, *supra*, are valid and constitutional as apply to milk originating outside the police jurisdiction of Mississippi. These regulations would not be forbidden even though they might affect interstate commerce because they are rationally related to a state's legitimate objects of regulation. *United States* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943). States have wide latitude in their exercise of police power over facilities for handling milk. *H. P. Hood & Sons* v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948). The pertinent Mississippi regulations are protective measures for the health, safety, and welfare of its citizens and may constitutionally be relied upon. *Florida Lime and Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

Louisiana's failure to execute a reciprocity agreement prevents any part of §11 from being applied to Louisiana processors. The health and reciprocity features of §11 plainly interface with each other. By its failure to enter into reciprocity, Louisiana is saying that it will not on a

reciprocal basis accept the validity of Mississippi inspections and Mississippi ratings. There is a valid health related purpose in one state conceding that a sister state is making a believable and proper health inspection of milk. The overriding health related feature of §11 is the exchange of milk upon equivalent standards which are not necessarily chosen by each state but are a compromise.

That reciprocity and substantial equivalency of regulation go hand-in-hand is self-evident. The substantial equivalency standard of §11 insures both similar standards of inspection and of equal importance, similar execution of the inspections. Thus the substantial equivalency standard goes to the entire milk inspection procedures and *practices* utilized by a sending state. If Louisiana will not give trust and reliance to Mississippi's conduct of the inspections, then Mississippi is loath to accept the same Louisiana procedures, out of a regard for the health and welfare of her own citizens.

There is testimony that as of the November 6, 1972, date of the hearing on motion for preliminary injunction Mississippi accepted the 90 percent rating and the substantial equivalency of Louisiana regulations. But §11 imposes a continuing dual health requirement that requires ongoing supervision and continuing vigilance. "(1) The milk must be produced, pasteurized, and labeled under regulations which are substantially equivalent to this regulation, and (2) have been awarded an acceptable milk sanitation compliance rating of 90 percent or above. . . ." Failure of Louisiana to reciprocate gives rise to apprehension that continued inquiry by Mississippi authorities into the substantial equivalency of Louisiana regulations would be justified. This is true in a context where the substantial equivalency standard runs to the entire milk inspection procedures and practices utilized by a sending state. The

decision to accept the substantial equivalency of Louisiana's procedures is a pure health consideration which is made easier and more palatable where the sending state will reciprocate.

The adoption of §11 was a generous waiver of Mississippi's strict inspection requirements to facilitate trade. The effect of the provision as found by the District Court has been to lower trade barriers and create an open market for milk in the State of Mississippi. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* pp. 575-576. These findings are certainly not clearly erroneous. As to the claim that there has been an actual interference with the whole flow of interstate commerce, it clearly fails for want of proof. As this Court recently remarked in a totally different context but to similar effect, "On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous." *Gulf Oil Corp.* v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974).

Certainly the Mississippi regulation affects commerce and with respect to Louisiana processors affects it in a substantial way. But the effect on commerce is the inverse of what the appellant says. Manifestly, the effect of the regulation has been to open free and unfettered trade in milk. While appellant says the provision favors local processors and opens foreign markets for local businessmen (Jurisdictional Statement, p. 8), the true effect of the rule is to disadvantage local processors. In point of fact, §11 aids the free flow of milk, and to this the appellant A & P agrees:

> "Reciprocity, by eliminating hypertechnical standards peculiar to one state, may aid the flow of milk." Jurisdictional Statement, p. 9.

All of the authorities relied on by the appellant are inapposite. They involve trade barriers—whether directed to price, area, or quantity discrimination—which are transparently protectionist in design and result. *Polar Ice Cream & Creameries Co.* v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964), struck down a state regulatory scheme which required Florida distributors to purchase only from local milk producers. Foreign milk could enter the market only if there was an additional need. This was pure protectionism. Of similar import are the cases involving price differentials which effectively secure a preference for domestic producers. *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934). To the same effect are this Court's cases on geographical or territorial discrimination in milk ordinances. *Dean Milk Company* v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951).

The discriminatory regulations in these cases, touching price, quantity, and area discrimination, were unequivocal. A willing producer could not surmount them by meeting other standards. There was no safety valve such as the Mississippi scheme here at issue.[1] These standards are

---

1. The A & P milk produced at Kentwood, Louisiana, is technically eligible for shipment to Mississippi if it meets the health regulations applicable to domestic producers. Compliance with such standards would, of course, have to come about by means of out-of-state inspections of Louisiana dairies and processing plants by Mississippi authorities. Such inspections are not presently being conducted. Mr. Clinton Van Devender, Mississippi's Supervisor of Milk Sanitation Control, testified that he did not know whether milk processed in A & P's Kentwood plant met the State Board of Health's minimum standards for domestic producers: "We wouldn't know, because we have no cause as to whether they would or not." When asked to explain, he stated, "We haven't made any inspections of the plant or of the dairies involved in the milk supply. . . ." [p. 3, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

Mr. Van Devender also explained the relationship between reciprocity and out-of-state inspections:

(Continued on following page)

justifiable in the interest of the public, and the means for their enforcement are reasonably necessary for the accomplishment of a proper purpose, namely, safe and wholesome milk. *Lawton* v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).

Mississippi's milk sanitation and health requirements for domestic producers were and are applicable to out-of-state processors without a §11 reciprocity agreement. The milk produced by the Great A & P Tea Company of Louisiana falls short of those requirements. Had

---

Footnote Continued—

"Q. And without a reciprocity agreement then you would have to make an inspection of that milk at their plant or a plant of a producer and the originating plant?

A. Yes, sir, and the producers.

Q. So it would necessitate your having to enforce in the other states to do those things?

A. Yes, sir.

Q. What is the primary purpose in having the reciprocity agreement?

A. To prevent the necessity of going into those states and making inspections and being assured that they meet our standards." [pp. 6-7, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

A & P has not alleged or proved that the milk at the Kentwood plant meets all standards applicable to domestic producers. While one might draw the inference from the supplemental stipulation that such might be the case, the important point is that without reciprocity, Mississippi must make the determination of qualification itself, just as it does for domestic dairies. Acceptance of reciprocal inspections and inspection standards allows Mississippi to credit both what Louisiana officials and the U. S. Department of Public Health report about the Kentwood plant instead of making continuing on-site inspections.

Without on-site Mississippi inspections and absent proof that Louisiana's milk meets Mississippi's domestic standards, the primary hurdle which A & P must cross is the more stringent standards of the State of Mississippi. This could come about only by the requisite inspections in Louisiana by Mississippi officials. Mr. Van Devender's testimony indicates that expense would be the primary factor inhibiting such out-of-state inspections. Of course, Louisiana would have to permit such inspections, as would the producer involved.

§11 never been passed, the State of Mississippi could, in conformity with the commerce clause of the Constitution, take whatever steps were necessary to enforce these exacting requirements. Mississippi could levy a nondiscriminatory excise tax upon out-of-state producers sufficient to defray the cost of additional inspections for trans-shipped milk. It could also require that on-site out-of-state inspections be conducted by its own inspectors as a prerequisite to entry to Mississippi markets. *Dixie Dairy Co.* v. *City of Chicago*, 355 F.Supp. 1351 (N.D. Ill., 1973). Both these devices, reasonably applied, would not offend the commerce clause. As a third alternative, Mississippi has opted for a reciprocal inspection system which obviates the financial burden of inspections or taxes. If the State of Mississippi could do the former it seems on principle entirely valid that she do the latter.

Section 11 clearly meets the balancing test this Court has ordained in commerce cases. The burden imposed by §11 is clearly not excessive in relation to the putative local interests. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). Where §11 clearly produces far-ranging free trade in milk with respect to other sister states, this Court cannot say that the regulation serves provincial local interests. Further, the benefits enjoyed by the State of Mississippi in avoiding costly out-of-state inspections should be weighed in the balance. The focus clearly should be on interstate commerce in milk through Mississippi with respect to all sister states and not the business interests of the Great A & P Tea Company of Louisiana, which set up its Kentwood processing facility in either disregard of or ignorance of applicable Mississippi regulations.

Mississippi's §11 regulation is a reasonably nondiscriminatory alternative to barriers that would result from

application from Mississippi's own domestic requirements to foreign producers. There is no purer example of such barriers than Dr. Vidrine's explanation of Louisiana's trade barrier in milk. §11 is a proper regulatory bypass of strict adherence by each state to its own exacting standards. In exactly the way envisioned by *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), Mississippi has opted for accepting substantially equivalent regulations of a sister state rather than charging the actual and reasonable cost of out-of-state inspections to importing producers. *Dean Milk, supra,* approved this approach, and Mississippi has accepted the invitation with the proviso the forwarding state accept Mississippi ratings and equality of Mississippi's regulations.

The additional requirement of reciprocity is consistent with *Dean Milk* and its family of cases. The practical effect of Mississippi's regulation is one which satisfies this Court's standards for a justifiable indirect burden upon commerce. First, Mississippi has opened its borders by its policies and has not "placed itself in a position of economic isolation." *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032. Second, in dealing with a commodity like milk, Mississippi has conditioned importation upon "fitting standards of sanitation. . . ." Those fitting standards are to waive its own strict requirements and replace them with a regime under which believable sister state inspections and inspection ratings up to 90 percent of the federal standard are enough if the forwarding state will agree.

Reciprocity, as conceived and operated by Mississippi health authorities, preserves both free trade in milk and protection of the health and safety of the state's inhabitants. Through reciprocity a minimum of indirect interference with interstate commerce results. As in the case

of Louisiana, Mississippi's policy only results in an obstruction of trade where a sister stat adopts avowedly nonstatutory and unconstitutional policies to protect local dairies. While Louisiana is not a party defendant, this Court cannot overlook Louisiana's stubborn policies as Court balances the effect upon all commerce.

With mutual exchanges of standards of inspection under §11, Mississippi does not appreciably burden interstate trade. Such incidental or indirect burden as that which afflicts A & P, *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752, does not appreciably burden interstate trade. Interstate commerce in milk is a two-way street. Mississippi's regulations presuppose that foreign states will accept her milk, and §11 provides a basis for that acceptance.

Mississippi's policy cannot be judged by the interruption which a foreign state's recalcitrance produces. In other words, but for Louisiana's policy, Mississippi's regulation would serve valid health purposes and valid relaxed regulatory requirements. But Louisiana's obstinate policies jam the interstate machinery.

Appellant argues access to interstate commerce cannot be conditioned upon the action of some other state. This Court's authority is to the contrary. In *Mintz* v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933), the State of New York required that every interstate shipment of livestock be accompanied by a certificate from the sending state's chief sanitary officer that the cattle and their herds were free from Bangs disease. The Court held that the order was an appropriate inspection measure to prevent further spread of disease. This Court implicitly ruled that the rights of private parties might hinge upon the actions or inaction of government bodies. Of course, A & P could have had redress in the State or Federal

Courts against Louisiana officials both for commerce clause reasons as well as grounds under the applicable Louisiana health statutes. If A & P is being prejudiced by the actions of Louisiana health officials it should direct its complaints there.

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed from, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies.

The presence of any issue concerning access to Mississippi markets by other out-of-state processors is a mystery. The original complaint for a declaratory judgment and injunctive relief does not raise the issue. No amended pleading does so. The grandfather clause treatment did not relate to §11, the only statute or regulation under attack. No relief was asked concerning any previous statute or regulation in existence before §11 which might have provided authority for other dairies to enter, nor was any such statute adduced by appellant. Yet, A & P in the "Questions Presented" portion of its jurisdictional statement states as follows:

> "A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A & P unconstitutionally deprives A & P of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution." [Jurisdictional Statement, p. 4]

This issue was injected into the case quite by accident. At the hearing on motion for preliminary injunction on November 6, 1972, counsel for the appellee Dr. Cottrell introduced a document showing those dairies who were shipping under §11 reciprocal agreements. [Exhibit F, p. 10, *Original Stipulation*] The document containing this information also showed that four dairies in Louisiana and two in Alabama were grandfathered into the state at the time §11 was adopted. A & P did not further explore the issue.

One year elapsed between the November 6, 1972, hearing and the hearing on merits. A & P, having learned of the access to Mississippi by other Louisiana dairies, filed no amended pleading and undertook no further discovery. In fact, it is quite clear that the only use A & P made of these grandfather clause regulations was to argue in the Trial Court, as they did in their jurisdictional statement (Jurisdictional Statement, p. 5) that A & P met all the health related requirements Mississippi imposed because certain other out-of-state dairies which were not inspected could ship into Mississippi. Of course, this reasoning pales before the explanation that A & P is barred not by the §11 health standards but by the standards applicable to domestic producers. *Supra*, p. 8. But as far as the pleadings, testimony, and stipulations are concerned, there is no factual development by A & P of the policies and practices underlying these grandfather regulations or their source in state law.

A & P has not sought to learn under what regulations or policies the grandfathered in dairies who have shipped into Mississippi before 1967 were continued. That, of course, bears materially upon whether they have sought an injunction against a state statute or regulation of statewide import

by reason of its unconstitutionality or whether such an injunction has been denied under 28 USC §2281. The only record fact which even tangentially bears upon the grandfather regulations is that no inspections are conducted outside Mississippi. It does not appear of record what health standards are applied to these grandfathered in dairies, or under what regulation they were admitted. There is no record on whether any reciprocal arrangements were a part of these grandfather clause regulations. As to Louisiana, it is clear that reciprocity was no part of the grandfathered in dairies since Mississippi processed milk cannot enter Louisiana. (Testimony of Clinton Van Devender, p. 7, Exhibit F, *Original Stipulation*) Finally, it is not shown that access under the grandfather clause is necessarily statewide access. In other words, the grandfathered regulations may have granted access to certain counties, not the whole state.

On this state of facts, the District Court treated the incipient claim against the grandfather clause regulations as a substantive claim for relief. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* p. 576. The Court held the rule did not violate equal protection. Conceding that the reciprocal agreement feature of §11 was valid, the court felt enjoining it because of the grandfather clause regulations would have barred the imposition of a valid reciprocity policy at any time in the future to any dairies in states where some dairies had been grandfathered in. A & P simply could not have through the back door what it could not obtain through the front.

At a minimum this Court lacks jurisdiction of the appeal over the issue of grandfather clause regulations. Whether this is a 28 USC §1253 appeal depends, in turn, on whether a Three Judge Court was properly convoked to hear that issue. *Moody* v. *Flowers*, 387 U.S. 97, 87 S.Ct.

1544, 18 L.Ed.2d 643 (1967).[2] At the outset the equal protection claim concerning the grandfather clause regulations was not properly before the Three Judge Court. It was clear that the grandfather clause processors did not enter the state by virtue of or under the auspices of §11. A different and previous regulation or policy was the source. This is clear from the very language of §11. No statute or regulation embodying the grandfather clause policy was before the Court. Given the void in the evidence concerning the source or application of the grandfather clause regulations sustaining a §1253 appeal concerning it would be to take jurisdiction where none affirmatively appears.

One cannot tell from the pleadings, the opinion of the Court, or the jurisdictional statement exactly the relief A & P wants concerning the grandfather clause. If they are attacking the grandfather clause policy it would appear that an injunction would merely bar enforcement of that policy further. This would strip the grandfathered in dairies of their access but would not affirmatively benefit A & P. In that posture any jurisdiction of such a claim

---

2.

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

would fail, since A & P has no direct interest in merely disadvantaging its competitors without obtaining any affirmative benefit for itself. *Golden* v. *Zwickler,* 394 U.S. 103, 110, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Couched in that way the requested relief would not obtain any protection for A & P against actual interference with their rights. *United Public Workers of America* v. *Mitchum,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). If proscription of the grandfather policy is at issue, A & P is clearly before this Court urging someone else's lawsuit. To take access by means of interstate commerce away from competitors places A & P in the position of urging less constitutional protection for everyone. It does not undo allegedly unconstitutional conduct with respect to A & P.

To the contrary, if A & P is suggesting that it is entitled to a mandatory injunction to obtain entry for her milk because of the claimed equal protection violation as to the grandfathered dairies theory, then it is not challenging §11 as to constitutionality. §11 says not a word about grandfathered dairies. Such dairies as were grandfathered were continued in existence under predecessor regulations, not §11. Hence, there is no Three Judge case. *Public Service Commission* v. *Wycoff,* 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *Bailey* v. *Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962).

A Three Judge case and a proper §1253 appeal also are lacking on A & P's assertion that the grandfather treatment is nonstatutory and therefore ultra vires. At page 12 of the Jurisdictional Statement, A & P says "At no time has Mississippi proffered any state legislative act to permit such grandfather treatment." This says that the policy is followed without statutory approval and, therefore, the attack on it cannot be a challenge to the constitutionality of a state statute. Note that the appellant does not say that

the grandfather regulation takes place under a state legislative enactment but merely exceeds that authority. *Frasier* v. *Board of Trustees of University of North Carolina,* (D.C. of N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956) A & P affirmatively says that there is no such statute. Therefore, A & P's claim against the grandfather policy does not attack a state statute or policy thereunder. *Phillips* v. *U. S.,* 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Moody* v. *Flowers, supra.*

The order denying A & P relief on its equal protection claim is not an order denying an injunction against a state statute. A & P did not seek an injunction against the enforcement of the grandfather policy so much as they appear to be asking the Court, for the first time on the appellate level, to mandamus the state authorities to grant A & P the same privileges as the grandfathered in dairies. Since a prohibitory injunction would not have availed A & P of any benefits, the Three Judge Court's resulting decision against A & P is in the nature of a declaratory judgment. A & P did include in its original prayer for relief a prayer for a declaratory judgment that Mississippi's policy under §11 violated the commerce clause.

On the extravagant assumption that this Court might treat the grandfather policy as intrinsically related and ancillary to the Three Judge issue, the District Court's holding on the equal protection question is in the nature of a declaratory judgment which is not directly appealable pursuant to §1253. *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970). Since a favorable decision for A & P on the equal protection claim could not have granted them access to Mississippi markets, by the same token the District Court's unfavorable ruling did not deny them coercive relief. This makes the matter nonappealable under 28 USC §1253.

Finally, there is no warrant for considering the equal protection claim, ambivalent as it is, as pendent to the §11 claim. *Perez* v. *Ledesma,* 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed. 2d 701 (1971). The equal protection claim turns on different facts, questions different regulations, though they are not identified, and does not require relief of a constitutional nature. There are clearly two claims—one against the enforcement of §11 turning on a constitutional challenge grounded in the commerce clause and another against pre-§11 grandfather treatment for dairies importing milk as of the date §11 was adopted. The relief as to the §11 claim would strike down enforcement of a state policy; relief on the equal protection claim if it were to be effective relief, would mandatorily add to a pre-existing state policy. As *Ledesma* ruled, "Even where a Three Judge Court is convened to consider one controversy between two parties, the parties are not necessarily entitled to a Three Judge Court and a direct appeal on other controversies which may exist between them." *Perez, supra,* 401 U.S. at 87, 88, 27 L.Ed.2d at 706.

CONCLUSION

§11 of Mississippi's milk regulations is a free trade provision both in purpose and effect. Such indirect burden as it visits upon the Great Atlantic & Pacific Tea Company of Louisiana is merely an indirect burden upon commerce produced by the recalcitrance of officials from a sister state. Mississippi is clearly within its province to adopt a reciprocal inspection program, for valid health reasons, as opposed to the adoption of excise taxes to support out-of-state inspections.

As to the belatedly raised equal protection claim, this Court is without jurisdiction to hear the matter, which should be heard by the United States Court of Appeals.

Appellee submits that the appeal from the judgment of the District Court denying all relief should be dismissed or, in the alternative, that the judgment and opinion upon which it is based should be affirmed without further briefing and argument.

Respectfully submitted,

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

By: HEBER LADNER, JR.